RECENT CASE NOTES

CORPORATIONS — MUNICIPAL CORPORATIONS — ESTOPPEL — NUISANCE—RAILROAD CROSSING.—A railroad built stub tracks on its private "right of way" through a city in 1910, the railway crossing several streets at grade. By law the privilege to cross the streets must be secured from the common council of the city, but this was not secured. Congestion of freight made necessary additional yards and side-tracks, the construction of which was commenced in May, 1916, also without securing the privilege to cross the intersecting streets. On July 31, the council granted this privilege and the company increased its operations and expended $5,000 during the next week. On August 7, the council rescinded its vote, and sought an injunction to restrain the building of the new tracks and to force the removal of those laid. *Held,* that the injunction should not be granted because the city was estopped to ask removal of tracks already laid, and because "equity" and the solution of the freight problem demanded the completion of those proposed. *City of Flint v. Grand Trunk Ry.* (1919, Mich.) 174 N. W. 147.

When a city acquiesces in the exercise of an apparent privilege to build and maintain tracks on a street and operate on them for some time, with considerable outlay and expense, it may be estopped to deny the railroad's privilege. See 3 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 1242. If the city has no power to grant such a privilege, it is perhaps a different matter. *Cf. Ashland v. Chicago & N. W. Ry.* (1900) 105 Wis. 398, 80 N. W. 1101. A few cases seem to deny the possibility of estoppel, but there was no great reliance on the conduct of the city. *Morris & Essex R. R. v. Newark* (1855) 10 N. J. Eq. 352; *Sacramento v. Pacific Gas & Electric Co.* (1916) 173 Calif. 787, 161 Pac. 978. In one the order to tear up the tracks had been issued only to force the traction company to accept a "franchise" it did not like. *Bangor v. Bay City Traction Co.* (1907) 147 Mich. 165, 110 N. W. 490. The instant case is an application of the usual rule, therefore, but it presents an additional fact in that the trial court found the crossings to be a public nuisance and dangerous to life. The decision of the upper court that the city had no right to deny the privilege disposes of this so far as the obstruction of the streets and the ordinary unpleasantness is concerned, for consent ends that as a nuisance. *Spokane Street Ry. v. Spokane Falls* (1893) 6 Wash. 521, 33 Pac. 1072. But the court failed to discuss the possibility that the danger to life might still remain a nuisance, and the tone of the opinion indicates that it is not so considered in spite of the finding of the court below. The case is best supported on the theory that physical property capable of lawful uses cannot be demolished because used unlawfully, but that the procedure is to restrain the unlawful use. See 2 Dillon, *op. cit.,* 688; *cf. Chicago v. Union Stock Yards & Transit Co.* (1896) 164 Ill. 224, 45 N. E. 430 (carrying cattle through city); *cf. St. Louis R. R. v. Kirkwood* (1900) 159 Mo. 239, 60 S. W. 110. In the instant case the danger to life can be obviated best, not by injunction, but by ordinances requiring safety devices, the company doubtless being under a liability of having such duties imposed upon it.

EVIDENCE—POST-TESTAMENTARY DECLARATIONS.—Application for the probate of a will was contested on grounds of forgery. Declarations of the testator that he had made a will for the benefit of the proponent were admitted to prove that the propounded will was genuine. *Held,* that the admission was proper. *In re Johnson's Estate* (1920, Wis.) 175 N. W. 917.

Three theories of the admissibility of post-testamentary declarations have been advanced by Professor Wigmore: first, since such declarations do not fall within any exception to the hearsay rule, they are not admissible; second, a special exception to the hearsay rule should be made in order to admit them; third, it is a recognized exception to the hearsay rule that they are admissible to show the state of mind of the testator at the time they were made, then by logical inference, from belief to the act itself, they are admissible to prove the act. See Wigmore, *Evidence* (1904) sec. 1736; see also 4 Chamberlayne, *Evidence* (1913) sec. 2654. More exactly, the steps in the process of inference are from utterance to the then present belief, from that belief to belief at the time of the act, and thence to the act itself. Therefore, by this theory, they are analogous to pre-testamentary statements, and it is submitted that no distinction should be made between them as to admissibility. Many cases have upheld the first theory. *In re Kennedy's Will* (1901) 167 N. Y. 163, 60 N. E. 442; *Throckmorton v. Holt* (1900) 180 U. S. 552, 21 Sup. Ct. 474. Of course, the declarations may be admissible to show the state of mind even though the above inferences are not permitted to be drawn therefrom. *Cf. Mangle v. Parker* (1908) 75 N. H. 139, 71 Atl. 637. Such a limitation, however, excludes much relevant evidence, and frequently the best or only evidence of an act of the testator. Therefore it is suggested that the second theory be adopted, and that the declarations be admitted as a special exception to the hearsay rule. This view has been upheld by many cases. *Cf. Schnee v. Schnee* (1900) 61 Kan. 643, 60 Pac. 738; *cf. In re Saunders' Will* (1919) 177 N. C. 156, 98 S. E. 378; *cf. Sugden v. Lord St. Leonards* (1876, Eng.) 1 P. D. 154. Professor Wigmore's third theory unquestionably is logically sound, but its acceptance would practically mean the breakdown of the hearsay rule, if the reasoning is carried to its logical conclusion, because a state of mind is just as much evidence of any act as of a testamentary act. Furthermore, there is no direct authority to support this view. The conclusion of the principal case, that if post-testamentary declarations are admissible to prove the contents of a lost will, then they are equally admissible to prove that the propounded instrument was genuine, because conforming in content to the testator's intent, seem sound. But it has been held *contra*. *Cf. McDonald v. McDonald* (1895) 142 Ind. 55, 41 N. E. 336.

MASTER AND SERVANT—LENDING SERVANT.—The defendants contracted to do haulage for the ministry of munitions in discharging a vessel into railway wagons, and lent to the ministry a man to shunt wagons. The man negligently set certain wagons in motion, thereby closing the space between two of the wagons, which resulted in the injury of the plaintiff. He sued for damages. *Held*, that the plaintiff should recover. *Poulson v. John Jarvis & Sons, Ltd.* (1919, Ct. App.) 26 Times L. R. 160.

It was early established that when the servant of one man is lent to or hired by another, the duty to respond in damages for the servant's negligence is imposed on the one who had control of the servant's work. *Sadler v. Henlock* (1855, Q. B.) 4 E. & B. 570. Where there have been no express regulations in the contract of hire, this control has been inferred from certain special facts. *Norris v. Kohler* (1869) 41 N. Y. 42 (ownership of instrumentalities); *Wyllie v. Palmer* (1893) 137 N. Y. 248, 33 N. E. 381 (particular nature of work requiring supervision); *Hardy v. Shedden Co.* (1897, C. C. A. 6th) 78 Fed. 610 (circumstances of employment, such as distance from original master); *Kelly v. Mayor, etc. of New York* (1854) 11 N. Y. 432 (existence of a contract requiring original employer to do work). These evidential facts have in some cases been given the effect of presumptions and sometimes regarded as almost conclusive. Other facts have been held to be conclusive. *Whitney & Starrette Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242 (selection and payment by one of